87-1220

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROCKLAND INDUSTRIES, INC.,
Petitioner,

v.

JAMES CHUMBLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEPHEN H. SACHS
Counsel of Record
GLENN J. MORAMARCO
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

January 21, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether an appellate court reviewing a trial court's grant of a new trial pursuant to Fed. R. Civ. P. 59 errs when it fails to give any deference to a trial court's conclusions concerning credibility of witnesses and weight of the evidence.

2. Whether the Seventh Amendment's guarantee that "the right of trial by jury shall be preserved" not only preserves the right to a jury, but also preserves the right to a trial supervised by an impartial judge with the historic prerogative to order a new trial when the interests of justice so require.

PARTIES

In *Chumbley v. Rockland Industries*, which was before the Fourth Circuit as combined cases 86-3584 & 86-3618, the plaintiffs/appellants were James Chumbley, Thomas Lenchek, Michael Corke, Jo Yount, and Adrian De Bee. Rockland Industries, Inc. was the defendant/appellèe, and Warm Window, Inc. was a third-party defendant. Rockland Industries, Inc. does not seek this Court's review of the disposition of its claim against Warm Window, Inc. Therefore, the respondents in this case are James Chumbley, Thomas Lenchek, Michael Corke, Jo Yount, and Adrian De Bee. Rockland Industries, Inc. is the sole petitioner.*

* Rockland has no parent company or affiliates, and its subsidiaries are all wholly owned.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

ROCKLAND INDUSTRIES, INC.,
Petitioner,

v.

JAMES CHUMBLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Rockland Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding entered September 17, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals in *Rockland Industries, Inc. v. Chumbley* (Nos. 86-3584 & 86-3618), is not reported; it is set forth in the Appendix at 1. The opinion of the United States District Court for the District of Maryland (No. JFM-84-3237) is also not reported; it is set forth in the Appendix at 18.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship. On June 20, 1986, the U.S. District Court for the District of Maryland rendered its final judgment. App.

at 29. The judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on September 17, 1987. App. at 28. A timely petition for rehearing was denied by an order entered on October 26, 1987. App. at 32. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

STATEMENT OF THE CASE

This lawsuit involves a group of individuals (collectively referred to as "Chumbley") and Rockland Industries, Inc. ("Rockland"). The suit arose out of a 1982 agreement in which Rockland agreed to pay royalties and commissions to Chumbley in exchange for the right to

manufacture and sell certain Warm Window products invented by Chumbley. In August 1984, Chumbley instituted suit against Rockland for breach of the 1982 agreement. The suit's major allegation was that Rockland had failed to diligently use reasonable efforts to promote the sale of Warm Windows, thereby depriving Chumbley of possible royalties and commissions.

The case was tried by a six-member jury in the United States District Court for the District of Maryland before Judge J. Frederick Motz. At the conclusion of a six week trial, the jury returned a verdict in favor of Chumbley on his claim that Rockland breached its duty to diligently use reasonable efforts.[1] The jury's special verdict included a compensatory damage award to Chumbley of $1,000,000.00 on this due diligence claim.

At the conclusion of the trial, Rockland moved for a judgment n.o.v. and in the alternative for a new trial. Judge Motz concluded that the expert testimony presented by Chumbley to prove his damages was so fatally flawed that it could not support the jury's verdict. He found that the premises used by Chumbley's expert on damages were baseless, app. at 21 ("Her castle of damages was built upon sand"), and he concluded that she was "entirely unqualified to be a marketing expert." *Id.* Judge Motz further concluded that the expert testimony was so incompetent, inadequate and improper that it should have been stricken. App. at 20-23. He therefore entered a judgment n.o.v. which reduced the award on Chumbley's due diligence claim to one dollar.

In the event of appellate court reversal, Judge Motz also granted Rockland's alternative motion for a new trial on all issues. In ruling on the motion for a new

---

[1] The jury also found for Chumbley on a $7700 claim for reimbursement of certain promotional expenses and against Rockland on its counterclaim. Rockland does not seek review in this Court of the Fourth Circuit's actions regarding either of these issues.

trial, Judge Motz stated that he was "convinced to a moral certainty that . . . a gross miscarriage of justice would result if a new trial were not granted. . . . The verdict is shocking." App. at 24. After observing the trial and the witnesses for six weeks, Judge Motz concluded that there was simply no "underlying reality" to Chumbley's contentions. *Id.* Both Chumbley and Rockland stood to gain from Warm Window's success, and Rockland therefore had absolutely no motive not to use its best efforts to market Warm Window's products. App. at 26-27. As Judge Motz noted, "Rockland's evidence . . . was forceful. Its two marketing experts had sound credentials, had done their homework and had substantial knowledge of the relevant industry." App. at 26. Judge Motz concluded that "the overwhelming weight of the evidence was against the jury's verdict." App. at 27.

On appeal before the Fourth Circuit, a unanimous panel reversed the judgment n.o.v. because there was some evidence that, if believed, could support the jury's verdict. App. at 12-14. Rockland does not seek review of that conclusion. However, by a two to one vote, the panel also reversed the alternative grant of a new trial and reinstated the original $1,000,000.00 jury verdict. Judge Wilkinson, dissenting from the reversal of the new trial order, argued that the majority was altering the careful balance between the functions of the trial judge and jury by refusing to recognize the district court's discretion in granting a new trial motion. App. at 16.

A petition for panel rehearing and rehearing in banc was denied by order entered October 26, 1987. App. at 32. On December 3, 1987, the Fourth Circuit denied Rockland's motion to stay the mandate pending application to this Court for a writ of certiorari.[2] App. at 30.

---

[2] After the entry of the Fourth Circuit's final order directing the district court to enter judgment on the basis of the jury's verdict, Rockland filed a Fed. R. Civ. P. 60(b) motion, which is still pending before the district court, for relief from the judgment. Rockland's

REASONS FOR GRANTING THE WRIT

I. There is widespread confusion among and within federal appellate courts as to the proper deference due a trial court's decision to order a new trial pursuant to Fed. R. Civ. P. 59.

The standard of appellate review of a trial court's decision to order a new trial is an issue of fundamental importance to the proper functioning of the federal appellate system. Nonetheless, the degree of deference given to trial court conclusions varies enormously among and within the courts of appeals. As a result, appellate review of new trial orders is often unpredictable and unprincipled. As Wright and Miller have observed:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial.

11 C. Wright & A. Miller, Federal Practice and Procedure § 2818 at 118 (1973).

Some appellate courts continue to demonstrate the high degree of deference to a trial court's decision to grant a new trial endorsed by this Court in *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838), *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933), *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-48 (1940), and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Other appellate courts, however, engage in plenary reweighing of the evidence with scant deference to the trial court's conclusions con-

---

motion for relief relies on newly discovered facts concerning the lapse of Chumbley's patent, and it therefore challenges nothing that formed the basis of the Fourth Circuit's opinion or mandate. As noted in Rule 60 itself, the filing of a motion for relief "under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b).

cerning credibility of witnesses and the weight of the evidence.

The opinion of the Tenth Circuit in *Harris v. Quinones*, 507 F.2d 533 (10th Cir. 1974), and the opinion of the Ninth Circuit in *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296 (9th Cir. 1978), are examples of the traditional deferential approach. *Quinones* was a simple traffic accident case in which the jury returned a verdict for the defendant, finding that the defendant driver was not negligent and that the injured plaintiff was contributorily negligent. The trial court granted a new trial because the verdict was against the weight of the evidence. On appeal after the new trial, the Tenth Circuit held that a grant or denial of a new trial motion posed a question of fact, not of law, and it therefore should not be reversed "absent an unusual situation . . . or the showing of a gross abuse of discretion." 507 F.2d at 535. Although a traffic accident involving disputed witness testimony is presumably among the easiest cases for a jury to examine, the Tenth Circuit followed the traditional approach and deferred to the trial judge's conclusions concerning the weight of the evidence.

Similarly, in *Reddi-Wip*, a more complex case involving alleged Sherman Act violations, the Ninth Circuit reversed the trial court's grant of a judgment n.o.v., but upheld the alternative grant of a new trial. The court noted that on a motion for a new trial the trial court is entitled to draw its own conclusions on credibility of witnesses and weight of the evidence. The Ninth Circuit deferred to the trial court's conclusions and upheld the grant of a new trial despite the fact that the "evidence was abundant" on the long-standing enmity between the parties—evidence that supported the jury's conclusion that a refusal to deal was based on anticompetitive purposes rather than legitimate business purposes. 568 F.2d at 1301. *See also Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1221 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058

(1986) (weight of the evidence arguments are "particularly directed to the discretion of the district court" and grant or denial of new trial should not be reversed "absent a strong showing of clear abuse").

In contrast to the above cases, the opinion of the Eleventh Circuit in *J & H Auto Trim Co. v. Bellefonte Insurance Co.*, 677 F.2d 1365 (11th Cir. 1982), and the opinion of the District of Columbia Circuit in *Vander Zee v. Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), stand as examples of a non-deferential approach. In *J & H Auto Trim*, the Eleventh Circuit stated that it would conduct "a stringent and searching review of the record," 677 F.2d at 1373, and showed no deference to the trial judge's assessment of the strength of the evidence. Similarly, in *Karabatsos*, the D.C. Circuit rejected the trial court's conclusions concerning the credibility of witnesses and overturned a grant of a new trial merely because there was some testimony to support the jurors' decision. 589 F.2d at 729. In both of these cases, although the appellate courts invoked the "abuse of discretion" standard, they reviewed the record independently and came to their own conclusions concerning the weight of the evidence.[3]

Confusion within the circuits is even more apparent than the disparities between them. The Fifth Circuit is the best exemplar of this state of internal circuit con-

---

[3] As one commentator has noted, such an inquiry is inconsistent with an abuse of discretion standard of review. "[I]f the appellate court reverses merely because it disagrees with the lower court's ground as 'untenable,' the effect is to treat the exercise of discretion in the same way as a ruling on an issue of law. In my view, the fact that the higher court does not hold the same view as the trial judge is an insufficient basis for reversing an exercise of discretion, if by that term we mean an area of trial court choice that is shielded from the kind of searching review that is given to a ruling on a question of law." Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 179 (1975).

fusion. In *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362-63 (5th Cir. 1980), a panel of the Fifth Circuit utilized the non-deferential approach and applied the "greatest degree of scrutiny" to its review over a district court's decision to grant a new trial on the ground that the verdict was against the weight of the evidence. *See also Narcisse v. Illinois Cent. Gulf R. Co.*, 620 F.2d 544 (5th Cir. 1980); *Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976). These cases stand in stark contrast to *United States v. An Article of Drug Consisting of 4,680 Pails, etc.*, 725 F.2d 976 (5th Cir. 1984), in which a panel of the Fifth Circuit gave virtually unlimited deference to a district court's decision to grant a new trial because the verdict was contrary to the evidence. In that case the Fifth Circuit said that it would reverse the trial judge's decision "only where there is an 'absolute absence' of evidence contrary to the jury's verdict." *Id.* at 90 (emphasis in original). *See also Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416 (5th Cir. 1985); *United States v. Horton*, 622 F.2d 144 (5th Cir. 1980); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111 (5th Cir. 1980). The two standards could not be more different.[4]

The Fourth Circuit is in a similar state of internal disarray. In *Johnson v. Parrish*, 827 F.2d 988 (4th Cir. 1987), the Fourth Circuit showed extreme deference to a trial court's decision to grant a new trial and stated that "the clearly discretionary act embodied in granting a new trial is reviewable only in the 'most exceptional circumstances.'" *Id.* at 991 (quoting *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941)).

---

[4] Also compare *Bazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th Cir. 1979), *cert. denied*, 449 U.S. 829 (1980) (new trial grant affirmed because review is "severely limited" and trial judge is free to reweigh evidence), with *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976) (grant of a new trial reversed where trial court reweighed conflicting evidence).

The court said that it could not reverse for abuse of discretion merely because the panel might disagree with the trial court's conclusion. Although decided within two weeks of each other, the Fourth Circuit's published opinion in *Johnson v. Parrish* conflicts sharply with its unpublished *Chumbley v. Rockland* opinion, where the panel merely found some evidence to support the jury's verdict, reweighed the evidence for itself, and reversed the trial court's exercise of discretion.[5]

Although all appellate courts nominally purport to apply an "abuse of discretion" standard of appellate review to district court decisions to grant a new trial, this formula serves only to obscure the actual practice of appellate courts. Far from employing a uniform standard of review, appellate courts have applied a widely divergent and unpredictable array of standards of review. The relation between trial and appellate courts is fundamental to the proper functioning of the federal courts, and regardless of whether this Court ultimately concludes that the proper standard of review should be maximally or minimally deferential, this Court should dispel the confusion that currently surrounds the question of new trial orders.

---

[5] We believe that this Court is and ought to be concerned about the growing trend of unpublished appellate court opinions. *C.I.R. v. McCoy*, 108 S. Ct. 217, 219 (1987). *See also* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981); Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978). Certainly it is reasonable for a court of appeals to fail to publish a summary affirmance of a district court decision; such a decision usually would add little to the jurisprudence of the Circuit. However, the failure to publish a reversal of a district court decision, especially when, as in this case, there is a dissenting opinion, either hinders the growth of the jurisprudence on an issue about which there is reasonable dispute or serves to hide a hasty or unwise judgment.

II. Contrary to this Court's precedents, some appellate courts have greatly expanded the degree of appellate scrutiny over Rule 59 new trial orders.

Without the approval of this Court, many courts of appeals have fundamentally altered the careful division of responsibilities between federal trial and appellate courts by undercutting the deference historically accorded to district court decisions on new trial motions.

As late as 1953, Judge Learned Hand stated that it was "too well established to justify discussion" that orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence were *unreviewable*. *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). Indeed, this Court had established this principle clearly and directly in an unbroken line of cases stretching back over 100 years. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-48 (1940); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838).[6]

Despite this Court's clear pronouncements on the subject, however, some isolated appellate court decisions began to invoke the abuse of discretion standard of appellate review. The earliest cases tended to be ones in which the motions for a new trial were based on claims of newly discovered evidence. *See, e.g., United States v. Bransen*, 142 F.2d 232, 235 (9th Cir. 1944) (review permitted for "clear abuse of discretion"); *Atlantic*

---

[6] Of course appellate courts could always exercise review if the trial court granted or denied a new trial motion while acting under a misapprehension of the law, or if it failed to exercise its discretion at all. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-83 (1933). But questions of the sufficiency of a damage award, *Fairmount Glass*, 287 U.S. at 481, or whether a verdict was contrary to the weight of the evidence, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-48 (1940), were factual questions for which appellate review was improper. The power to grant or deny a new trial motion was left to the sole discretion of the trial court.

Coast Line R. Co. v. Smith, 135 F.2d 40, 41 (5th Cir. 1943) (review permitted for "manifest abuse of discretion"). Indeed, some of the cases that invoked the abuse of discretion language for new trial motions based on newly discovered evidence nevertheless continued to recognize that motions based on the weight of the evidence were unreviewable. *See, e.g., Francis v. Southern Pac. Co.*, 162 F.2d 813, 818 (10th Cir. 1947), *aff'd*, 333 U.S. 445 (1948) (new trial motion on ground that verdict was against weight of evidence unreviewable; newly discovered evidence basis reviewed for "plain abuse of discretion").

It is important to note, however, that in all of the early cases in which the "abuse of discretion" language was invoked, it was clear that only extremely narrow appellate review was contemplated. For example, the Fourth Circuit, in *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941), clearly expressed the minimal scrutiny it believed the abuse of discretion test allowed:

> It is . . . well settled . . . that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge, and that his action thereon is not reviewable upon appeal, *save in the most exceptional circumstances.* The rule and the reason therefor is thus stated by Mr. Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal Co., supra: "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions. . . . The rule precludes likewise a review of such action by a Circuit Court of Appeals . . . . Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. More frequently the reason given for the denial of review is that the grant-

> ing or refusing a motion for a new trial is a matter within the discretion of the trial court."

Id. at 354-55 (citations omitted) (emphasis added).

However, once the power of appellate review became established through the "abuse of discretion" language, the historical perspective and caution that accompanied the earliest cases gradually but steadily weakened. Today, each of the Circuits will review a trial court's grant or denial of a new trial motion not only for errors of law, but also for an "abuse of discretion," and, as we point out in Part I above, many of these courts exercise the closest possible scrutiny over decisions granting new trial motions because the verdict was contrary to the weight of the evidence. *See, e.g., Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362-63 (5th Cir. 1980); *Vander Zee v. Karabatsos*, 589 F.2d 723, 728-29 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). This Court, however, has never given any indication that such heightened judicial review is appropriate. Indeed, only recently this Court reaffirmed the traditional rule that "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Because appellate courts have ignored this Court's clear teachings, intervention by this Court is necessary.

III. Heightened appellate scrutiny over new trial orders represents a fundamental shift in the balance between the roles of trial and appellate courts and requires appellate courts to perform a task for which they are unsuited institutionally.

Expansive appellate review of new trial orders is part of a long term trend toward more intrusive appellate review. *See* Wright, *The Doubtful Omniscience of Appel-*

late Courts, 41 Minn. L.R. 751 (1957); Nangle, *The Ever-Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409 (1981). It is a trend that, if unchecked, will multiply the number of expensive and time-consuming appeals, decrease the likelihood of settlement, lower the morale of trial court judges, and impair the confidence of litigants and the public in the decisions of the trial courts.

If added scrutiny significantly increased the probability of attaining just results, enhanced appellate review over new trial orders might well be justified. But because a trial court's conclusion concerning the weight of the evidence adduced at trial is predominantly a factual conclusion, appellate courts are unsuited institutionally to the task of reviewing such a decision under a non-deferential standard.

When an appellate court reviews a judgment n.o.v. its task is relatively simple. The appellant submits a brief which points to evidence in the record that would support the jury's verdict, and the appellate court is called upon to verify those record references and decide whether such evidence is sufficient as a matter of law to sustain the jury's verdict. However, reviewing a trial court's grant of a new trial because the verdict was contrary to the great weight of the evidence presents the appellate court with an entirely different task. The trial court's order will have been based on the judge's personal observations over the entire length of the trial. An appellate court cannot be expected to read the entire record from a long (in this case, six weeks) trial. The reviewing court will be forced to rely on the procedure outlined above, and look to the briefs for evidence supporting each party's claims. But a decision about the weight of the evidence at trial cannot easily be made by examining isolated and sterile bits of evidence from a cold record. As Judge Motz noted, "A trial is more than a board

game. Justice is not served simply by adding pieces together to fill in the configuration of a cause of action. There must be an underlying reality to what occurs in a courtroom." App. at 24. An appellate court cannot hope to capture accurately the overall sense of a trial that is so important in ruling on a new trial motion based on the weight of the evidence.[7]

As Professor Charles Alan Wright has written:

> If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges. Where the question is whether an award of damages is excessive or a verdict against the clear weight of the evidence, the trial judge has the vast advantage of having been present in the courtroom and heard the witnesses. . . .
>
> There is no way to know for sure whether trial courts or appellate courts are more often right. But in the absence of a clear showing that broadened appellate review leads to better justice . . . the cost of increased appellate review, in terms of time and expense to the parties, in terms of lessened confidence in the trial judge, and in terms of positive injustice

---

[7] As Judge Motz pointed out in the instant case, "The verdict is shocking. The reasons for this conclusion are so numerous that it would be impossible to state them all without reviewing all of the evidence in detail—a task which would be so time consuming so as to interfere with the expeditious resolution of this litigation." App. at 24. An appellate court is particularly unsuited to evaluate the weight of the evidence when testimony is conflicting. Again, as Judge Motz noted in the instant case, "the gossamer nature of [Chumbley's] evidence can only be fully appreciated by having observed the witnesses." App. at 24-25. Moreover, the appellate court has no opportunity to observe the particular jury whose verdict is being called into question. In the instant case Judge Motz stated that from his observation of the jury, he had concluded that the jury had not paid attention to the evidence adduced at trial. Transcript of Hearing before Judge Motz, May 23, 1986, pp. 25-26.

> to those who cannot appeal, seems to me clearly exorbitant.

Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L.R. 751, 781-82 (1957). *See also Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.) (Blackmun, J.), *cert. denied*, 368 U.S. 929 (1961) (inadequacy or excessiveness of a verdict is best left to trial court which has observed witnesses, and appellate review will be invoked only in those rare situations of "plain injustice" or a "monstrous" or "shocking" result).

When appellate courts ignore their own institutional limitations and begin to strictly scrutinize a fact-intensive conclusion about the need for a new trial, it cannot help but lead to a proliferation of appeals in the already overburdened courts [8] and to general disruption in the orderly administration of justice. In a similar case in which a panel of the Eighth Circuit closely scrutinized and then found an abuse of discretion in a trial court's decision to grant a new trial, Judge Mehaffy dissented from a denial of rehearing en banc and noted:

> There is no way to predict how much additional work will be created if the rule of this circuit in such matters is abrogated. If we must follow the panel's new rule, it will place this court in the role of trying cases de novo for which we are not and cannot be equipped. Furthermore, this new appellate capacity threatens to erode the factfinding responsibility of the district courts.

Fireman's Fund Insurance Co. v. Aalco Wrecking Co., 466 F.2d 179, 190 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

---

[8] The federal appellate courts have had a ninefold increase in their workload over the last twenty-five years. Baker & McFarland, *The Need for a New National Court*, 100 Harv. L. Rev. 1400, 1405 (1987). As Chief Justice Rehnquist recently noted, the current workload poses a serious dilemma for the federal judiciary. *See* Rehnquist, *Year End Report 1987* at 5 (Jan. 1, 1988).

Recently, this Court has had occasion to remind appellate courts of their limited role in reviewing trial court findings of fact. In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), for example, the Court observed with respect to overbroad appellate interpretation of Fed. R. Civ. P. 52(a):

> [V]arious Courts of Appeals have on occasion asserted the theory that an appellate court may exercise *de novo* review over findings not based on credibility determinations. This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that "findings of fact shall not be set aside unless clearly erroneous." [citations omitted].

Id. at 574. *See also, Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (instructing appellate courts that Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.") Overzealous appellate application of Rule 59 currently calls for similar guidance. This case presents the Court with an opportunity to restore the appellate courts to their proper institutional role as reviewers of legal rather than factual error.[9]

---

[9] This Court has not hesitated to exercise its supervisory power and its unique function as guarantor of uniform justice in the federal system when the federal courts required direction and guidance in the application of an important rule of federal civil procedure. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (both elaborating on the standard for granting summary judgment under Fed. R. Civ. P. 56). *See also* Rehnquist, *A Plea For Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System.* 28 St. Louis U.L.J. 1, 6 (1984).

IV. Appellate invocation of the Seventh Amendment in order to justify more stringent review over new trial orders represents a fundamental misunderstanding of the origins and purposes of the Seventh Amendment.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Many of the appellate decisions that strictly scrutinize a trial court's decision to grant a new trial look to the Seventh Amendment jury trial guarantee as justification for their use of a higher degree of scrutiny over trial court rejections of jury verdicts. *See, e.g., Fondren v. Allstate Ins. Co.*, 790 F.2d 1533, 1533-34 (11th Cir. 1986); *Narcisse v. Illinois Cent. Gulf R. Co.*, 620 F.2d 544, 546 (5th Cir. 1980).

In *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), the Third Circuit stated that when a trial judge grants a new trial because the verdict was against the weight of the evidence,

> [s]uch an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision . . . Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Id. at 90. *See also Vander Zee v. Karabatsos*, 589 F.2d 723, 728-29 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979).

However, there is nothing in the Seventh Amendment itself or in the history of the right to jury trial that

would support heightened judicial scrutiny over a trial judge's discretionary decision to grant a new trial. The Seventh Amendment is not a blanket prohibition on the re-examination of facts found by juries; it prohibits only those re-examinations that were not countenanced by English common law.

Under common law principles that were well established at the time of the adoption of the Seventh Amendment, trial courts had the power "to grant a new trial for a variety of reasons with a view to the attainment of justice." 6A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 95.05[2] at 45 (1987). *See also* Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 55 (1916). Historically, a trial judge's power to grant a new trial was not viewed as being inconsistent with the right to a jury trial; rather, it was viewed as a necessary safeguard to protect the integrity of the judicial process.

> It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure.

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 353 (4th Cir. 1941) (emphasis in original) (quoting *Smith v. Times Publishing Co.*, 36 A. 296, 298 (Pa. 1897)). *Accord*, *Bright v. Eynon*, 1 Burr. 391, 393, 97 Eng. Rep. 365, 366 (K.B. 1757). Indeed, when the Seventh Amendment was adopted, a trial judge had a common law *duty* to grant a new trial when the ends of justice so required.[10] *Yeatts*, 122 F.2d at 353.

---

[10] Moreover, under English common law at the time of the Seventh Amendment's adoption, jury trials were not required when the practical abilities and limitations of juries made a jury trial inappropriate for the particular case. *See, Gartside v. Isherwood*, 1 Bro. C.C. 558, 28 Eng. Rep. 1297 (Ch. 1783); *Gyles v. Wilcox, Barrow & Nutt*, 2 Atk. 141, 26 Eng. Rep. 489 (Ch. 1740).

Thus, the constitutional right to a jury trial includes not only the right to an impartial jury, but also the right to have the trial presided over by an arbiter who will prevent the jury's verdict from overstepping the bounds of reason. As this Court has said, "In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors." *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 382 (1912). Appellate courts that have used the Seventh Amendment to denigrate the role of trial judges have been operating in an historical vacuum. They are oblivious to the important role of trial judges that the Seventh Amendment itself envisions.

As Judge Wilkinson noted in his dissent in the instant case, heightened appellate scrutiny over a grant of a new trial serves to "alter the careful balance that exists in The Federal Rules of Civil Procedure and innumerable precedents of this circuit between the function of the trial judge and the jury." App. at 16. It must be remembered that when a trial judge grants a motion for a new trial, he does not substitute his verdict for that of the jury's; rather he determines that justice will be best served if a *new jury* reconsiders the evidence. Because modern juries are being required to resolve factual disputes in cases of ever-increasing complexity, it is even more important today that trial judges retain their historic right to set aside a verdict that is contrary to the weight of evidence. This Court should grant certiorari to prevent appellate courts from using an ahistorical invocation of the Seventh Amendment to erode a trial judge's traditional prerogative in ruling on motions for new trials.

V. The Fourth Circuit's opinion has so far departed from the accepted and usual course of judicial proceedings that the exercise of this Court's supervisory power is called for.

The majority opinion in this case is clearly inadequate under any view of the proper scope of appellate review. Indeed, nowhere does the majority conclude that Judge

Motz abused his discretion in granting a new trial. The majority states only that "there was evidence from which, if believed, a jury could have awarded [damages in excess of what was awarded]." App. at 14. But the observation that there was some evidence to support a jury's verdict means only that the judgment n.o.v. was erroneously granted, not that the grant of a new trial was improper.

There is nothing in the majority's opinion that indicates that it deferred in the slightest degree to the conclusions reached by the trial court. After noting that it would not have been an abuse of discretion if the trial court had decided to exclude the expert testimony entirely, app. at 14, the majority refused to allow the court to correct its own error by ordering a new trial. And even after noting that the evidence concerning damages was very difficult for lay persons to understand, *id.*, the majority disregarded the trial court's conclusions on the crucial damages issue.[11] Finally, the majority disregarded the trial judge's statement that from his observations of the jury he believed that the jury had not listened to the evidence. *See* Transcript of Hearing before Judge Motz, May 23, 1986, pp. 25-26. In reversing the grant of a new trial the majority opinion failed to give *any deference at all* to the conclusions reached by the trial judge after observing both the witnesses and the jury for six weeks. In so doing the Fourth Circuit ran roughshod over Rockland's rights.

---

[11] Although other courts have consistently held that when a trial is lengthy or complex it is appropriate to give heightened deference to the trial court's conclusions, *see, e.g., Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985); *Lind v. Schenley*, 278 F.2d 79, 90-91 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), the majority in the instant case inexplicably concluded that the length of the trial was one factor weighing *against* affirmance of the new trial order. App. at 14.

Because the Fourth Circuit's decision, insofar as it fails to demonstrate any deference to the district court's findings, has so far departed from the accepted and usual course of judicial proceedings, and because it conflicts with past decisions of this Court, *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (although judgment n.o.v. cannot be granted unless case is insufficient as a matter of law, motion for a new trial invokes the discretion of the trial court); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (authority to grant new trial is confided almost entirely to trial court), the Court may wish to consider summary reversal.

CONCLUSION

The deference currently given to trial court decisions granting new trials based on the weight of the evidence varies so greatly among appellate courts and panels that appellate review over these decisions has become virtually standardless. The Seventh Amendment role of the trial judge as a guarantor of essential fairness in jury trials has been denigrated by appellate courts that have assumed a responsibility for which they are unsuited institutionally. Because this Court's guidance is required to clarify the standard of appellate review, this petition for certiorari should be granted.

Respectfully submitted,

STEPHEN H. SACHS
Counsel of Record
GLENN J. MORAMARCO
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

January 21, 1988

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3584

JAMES E. CHUMBLEY; THOMAS LENCHEK; MICHAEL CORKE; JO YOUNT; ADRIAN DE BEE,
Plaintiffs-Appellants

v.

ROCKLAND INDUSTRIES, INC.,
Defendant-Appellee

v.

WARM WINDOW, INC.,
Third-Party Defendant

No. 86-3618

JAMES E. CHUMBLEY; THOMAS LENCHEK; MICHAEL CORKE; JO YOUNT; ADRIAN DE BEE,
Plaintiffs-Appellants

v.

ROCKLAND INDUSTRIES, INC.,
Defendant-Appellee

v.

WARM WINDOW, INC.,
Third-Party Defendant

Appeal from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, District Judge—
(CA JFM-84-3237)

Argued: March 5, 1987 Decided: September 17, 1987

Before WINTER, Chief Judge, WILKINSON, Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

William David Nussbaum (Steven J. Routh; Hogan & Hartson on brief) for Appellants; Donald N. Rothman (Jack C. Tranter; William D. Gruhn; Gordon, Feinblatt, Rothman, Hoffberger & Hollander on brief) for Appellee.

PER CURIAM:

James Chumbley (Chumbley), one of plaintiffs, developed and patented a thermal insulated window covering system. In February 1980, Chumbley, together with certain minority shareholders (the other plaintiffs), incorporated Warm Window, Inc. (WWI), a Washington corporation, with its principal place of business in Seattle. In 1981, WWI's sales exceeded $497,000. In October 1982, Chumbley, WWI and Rockland Industries, Inc. (Rockland), a Maryland corporation with its principal place of business in Baltimore, entered into an "Exclusive Patent License Agreement" pursuant to which Rockland was authorized to manufacture and sell WWI products, and pursuant to which Rockland agreed that it would "diligently use reasonable efforts to promote the

sale" of such products [1] and pay to Chumbley certain "royalties" and "commissions." [2] Rockland, in 1982, was a nationally established drapery lining manufacturer.

In August 1984, Chumbley, as WWI's majority stockholder, joined with WWI's minority stockholders to institute the within suit against Rockland, for breach by Rockland of certain of its undertakings and obligations under the 1982 contract. Specifically, plaintiffs allege (a) breach by Rockland of its duty to exercise diligent, reasonable marketing efforts, (b) failure by Rockland to reimburse Chumbley for expenses incurred by Chumbley in the course of promotional efforts undertaken by Chumbley on behalf of Rockland, and (c) failure of Rockland to pay to Chumbley the correct amount of royalties and commissions. The district court granted relief to Chumbley as to (c) and, at the conclusion of a six-week trial, submitted (a) and (b) to the jury in the form of special questions pursuant to Federal Civil Rule 49(a). The jury's responses to those questions awarded to plaintiffs compensatory damages as to (a) in the amount of $1,000,000.00 and awarded to Chumbley as to (b) compensatory damages in the amount of $7700.00. Rockland's counterclaim against Chumbley for fraud and negligent misrepresentation was also submitted to the jury which, by its answers to the special questions, resolved the counterclaim issues in favor of Chumbley. Subsequently, the district court (1) granted Rockland's post-trial motion for judgment notwithstanding the jury's verdict, (2) entered judgment for plaintiffs in the amount of $1.00, and (3) ordered that if the "granting of the motion for judgment notwithstanding the verdict is reversed on appeal, defendant's motion for a new trial is granted." [3] The district court filed, along with its said

---

[1] App. 1350.

[2] App. 1351-52, 1356, 1376, 1380.

[3] App. 1346.

post-trial tripartite Order, a Memorandum setting forth the reasons for those actions by it. The Memorandum makes no reference to the $7700.00 item nor to the counterclaim, and appears to relate solely to the $1,000,000.00 jury verdict. Plaintiffs have appealed from the district court's post-trial Order seeking reinstitution of the jury's $1,000,000.00 and $7700.00 verdicts. Defendant has not appealed with regard to the counterclaim. In the context of the entire record before this court, it is clear that plaintiffs are entitled to entry of judgment by the district court as to the counterclaim and also as to the $7700.00 item. The issues, however, relating to the $1,000,000.00 award are considerably more troublesome.

While the district judge has not explicitly so stated, his analyses in the Memorandum accompanying the post-trial tripartite Order and the entry by the district court of nominal damages in the amount of $1.00 in place of the $1,000,000.00 jury verdict establish that the district court did not set aside plaintiffs' entitlement, as the result of the jury's answers to the special questions, to judgment as to liability in connection with plaintiffs' claim that Rockland did not diligently and reasonably promote the sale of WWI's products. Rather, the district court concluded that the evidence did not support the jury's award of $1,000,000.00, or indeed support a verdict of more than nominal damages, for Rockland's said failure. Thus, the district court's disagreement with the jury related to whether the jury's award of compensatory damages, in more than the minimal amount of $1.00, could stand. The district court concluded that only an award of minimal compensatory damages was appropriate. For the reasons set forth *infra*, we conclude that the district court's said conclusion constitutes reversible error.

LAW

The district court correctly noted the difference between the standards for granting a judgment notwith-

standing the verdict and for granting a new trial, a difference which is well stated by Professor Wright in C. Wright, *Law of Federal Courts*, § 95 at 640 (4th ed. 1983), as follows:

> The motion for judgment n.o.v., like the motion for directed verdict, raises only the legal question whether there was enough evidence to make an issue for the jury. It differs from the motion for a new trial, where the court has a discretion to set aside a verdict and grant a new trial even if the verdict is supported by substantial evidence. The motion for judgment n.o.v., on the other hand, must be denied if there is any substantial evidence supporting the verdict. The credibility of witnesses and weight of the evidence, proper considerations on a motion for a new trial, are not the concern of the court on a motion for a directed verdict or for judgment n.o.v. The evidence must be viewed in the light most favorable to the party against whom the motion is made, he must be given the benefit of all legitimate inferences that may be drawn in his favor from that evidence, and the motion must be denied if, so viewed, reasonable men might differ as to the conclusions of fact to be drawn.

In *Midcontinent Broadcast Co. v. North Central Air, Inc.*, 471 F.2d 357 (8th Cir. 1973), plaintiff's television tower was struck by defendant's airplane. Liability was clear. "The sole issue at trial was the amount of profits Midcontinent allegedly lost due to the accident." *Id.* at 358. After the jury returned a $500,000.00 verdict in favor of plaintiff, the trial court granted judgment n.o.v. for defendant and alternatively ordered a retrial. In so doing, the trial court, which had admitted the testimony of an expert called by plaintiff to prove "lost profits," "reversed itself" and held that such "testimony should have been excluded for lack of foundation." *Id.* Judge Lay, in reversing the judgment n.o.v., but in remanding for a new trial and in holding that the trial court had not abused its discretion in granting a new trial, held:

> In ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence.
>
> . . .
>
> The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Id. at 358-59.

Herein, the district court did about the same thing in a post-trial context as did the district court in *Midcontinent* and for the same reasons must be reversed as to its grant of judgment n.o.v.

In *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980), Judge Sprouse has written that in ruling upon a motion for judgment notwithstanding the verdict,

> the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motions should be denied, and the case submitted to the jury . [Citations omitted.]
>
> . . .
>
> The motion for a new trial on the merits, however, requires a review of the evidence under a different standard. Under Rule 59, F.R.Civ.P., a trial

> court may weigh the evidence and consider the credibility of the witnesses. Indeed, a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, "if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice . . . ." *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959), *citing*, *Aetna Casualty & Surety Company v. Yeatts*, 122 F.2d 350 (4th Cir. 1941).

See also Gill v. Rollins Protective Services Co., 773 F.2d 592, 594 (4th Cir. 1985), *modified on other grounds*, 788 F.2d 1042 (4th Cir. 1986), in which Judge Ervin quoted from and relied upon *Wyatt*.

In *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984), after a first trial in an employment discrimination case brought pursuant to 42 U.S.C. §§ 1981 and 1983 had ended in a hung jury and a second trial had resulted in a jury verdict of damages for plaintiff, the district court granted defendant's motion for a judgment n.o.v. and alternatively for a new trial. Judge Murnaghan held that "[t]he evidence permitted a reasoned conclusion of discrimination on the part of defendants and that "a judgment n.o.v. is to be reversed if, 'giving [the non-movant] the benefit of every legitimate inference in his favor, there was evidence upon which a jury could reasonably return a verdict for [plaintiff],' *Mays* [*v. Pioneer Lumber Corp.*], 502 F.2d [106] at 107 [(4th Cir. 1974, *cert. denied*, 420 U.S. 927 (1975)]. In so holding, Judge Murnaghan wrote:

> In reversing the district court's grant of a judgment n.o.v. and a new trial, this Court is guided by the principles articulated in *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). In *Mays*, the Court adopted the view expressed in 5A Moore's Federal Practice

§ 50.14 at 2382 (2nd ed. 1974), that "where the judgment n.o.v. is reversed and the trial court has alternatively granted the motion for a new trial, the case will ordinarily be remanded for a new trial, '[*b*]*ut the courts of appeals have authority to order otherwise.*'" (Emphasis added). The court then proceeded to reverse the district court's grant of a judgment n.o.v. and remanded with instructions to reinstate the verdict, since judicial efficiency would ill be served by permitting a third trial. Like the plaintiff in *Mays*, Abasiekong has also endured a first trial resulting in a hung jury and a second trial resulting in a judgment n.o.v.; and again, "two trials are enough, and indeed, all that the judicial system can presently afford." *Id.* at 110.

It is true that this Court has indicated its willingness to affirm the grant of a judgment n.o.v. as an appropriate "jury control device" when, in the absence of a "reasonable probability" or "substantial probability" of discriminatory motive, a jury has rendered its decision for a plaintiff on the basis of "sheer speculation." *Lovelace* [*v. Sherwin-Williams Co.*], 681 F.2d [230] at 242 [(4th Cir. 1982)]. By contrast, the verdict for Abasiekong reveals no juror speculation. The evidence permitted a reasoned conclusion resulting from careful consideration of the direct and indirect indicia of discrimination on the part of the City and Wilkison. Since a judgment n.o.v. is to be reversed if, "giving [the non-movant] the benefit of every legitimate inference in his favor, there was evidence upon which a jury could reasonably return a verdict for him," *Mays*, 502 F.2d at 107, the judgment n.o.v. in Appellees' favor must be reversed.

In ruling on Appellees' motion for a new trial, the district judge was permitted to "weigh the evidence and consider the credibility of the witnesses," and was required to grant a new trial "if he [were] of the opinion that the verdict [was] against the clear weight of the evidence, or [was] based upon evidence

which [was] false or [would] result in a miscarriage of justice . . . ." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980), *quoting Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959). Although the action of a district court in granting a new trial is to be reversed only upon a showing of abuse of discretion,[9] the district court does appear to have abused its discretion in Abasiekong's case. The jury's verdict was not against the clear weight of the evidence, and any "miscarriage of justice" is more seriously threatened by forcing Abasiekong through the rigors of yet a third trial than by allowing the jury verdict to stand. *See Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 88-91 (3rd Cir. 1960) (a trial judge should not "denigrate" the jury system by granting a new trial on grounds of insufficient evidence and substituting his own judgment of the facts and witness credibility, particularly when the subject matter of the trial is simple and easily comprehended by a lay jury.)

[9] *See United States v. Horton*, 622 F.2d 144, 147 (5th Cir. 1980) (per curiam) ("the grant or denial of a motion for a new trial is within the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse of discretion").

Abasiekong, 744 F.2d at 1059.

FACTS

The following Verdict Form, completed by the jury, reveals the special questions submitted to the jury and the jury's answers to those questions:[4]

Question No. 1

A. Has defendant breached its contractual obligation to diligently use reasonable efforts to promote the sale and use of Warm Window Products?

Check one: Yes X No __

[4] App. 1325-27.

If your answer to Part A is Yes, continue to Part B. If your answer to Part A is No, proceed directly to Question No. 2, and do not answer Part B of this Question.

B. What damages are plaintiffs entitled to as a result of defendant's failure to diligently use reasonable efforts to promote the sale and use of the Warm Window products?

Provide dollar figure, if any, appropriate for each of the following categories:

(1) *Past* royalties and commissions lost as a result of defendant's breach

(a) Commissions and royalties on lost sales to *former* customers: $400,000

(b) Royalties on lost sales to *new* customers: $100,000

(2) *Future* royalties and commissions lost as a result of defendant's breach

(a) Commissions and royalties on lost sales to *former* customers: $400,000

(b) Royalties on lost sales to *new* customers: $100,000

Question No. 2

A. Are plaintiffs entitled to payment from defendant for expenses incurred in the production of the Warm Window promotional videotape?

Check one: Yes X No ___

If your answer to Part A is Yes, continue to Part B. If your answer to Part A is No, proceed directly to Question No. 3, and do not address Part B of this Question.

B. What damages are plaintiffs entitled to in connection with the Warm Window promotional videotape?

Provide dollar figure: $7700.00

Question No. 3

A. Is Mr. Chumbley liable to defendant for fraud concerning the Warm Window drapery system?

Check one: Yes __ No X

If your answer to Part A is Yes, continue to Parts B and C. If your answer to Part A is No, proceed directly to Question No. 4, and do not answer Part B of this Question.

B. Are the other plaintiffs in this action liable to defendant for fraud concerning the Warm Window drapery system?

Check one: Yes __ No __

C. What damages is defendant entitled to as a result of fraud committed by Mr. Chumbley or plaintiffs concerning the Warm Window drapery system?

Provide dollar figure: _____

If your answer to Question 3A was Yes, do not consider Question 4. Consider Question No. 4 only if your answer to question No. 3A was No.

Question No. 4

A. Is Mr. Chumbley liable to defendant for negligent misrepresentation concerning the drapery system?

Check one: Yes __ No X

If your answer to Part A is Yes, continue to Parts B and C. If your answer to Part A is No, then do not continue, do not answer Parts B and C of this Question.

B. Are the other plaintiffs in this action liable to defendant for negligent misrepresentation concerning the Warm Window drapery system?

Check one: Yes __ No __

C. What damages is defendant entitled to as a result of negligent misrepresentation by Mr. Chumbley or plaintiffs concerning the Warm Window drapery system?

Provide dollar figure: _____

Consistent with those responses by the jury, the record contains evidence which would have *permitted* the jury to have made the following findings of fact:

1. From 1980 until October 1982, WWI had made quite a good start in terms of numbers of customers and dollar sales, but was badly undercapitalized and needed the financial and marketing resources of a company like Rockland to achieve what both Chumbley and Rockland believed in the fall of 1982 was WWI's reasonably likely potential growth.

2. Contrary to the expectations of Chumbley and Rockland, the sales of WWI's products, after Rockland took over, declined.

3. Rockland did not use the reasonably diligent efforts it was contractually required to utilize to promote the sale of WWI's products as evidenced, *inter alia*, by one or more of the following actions:

   (a) Rockland changed the names of Chumbley's products.

   (b) Rockland marketed and promoted competing products.

   (c) Rockland failed to promote and advertise WWI's products efficiently and appropriately.

   (d) Rockland assigned promotional and marketing duties in connection with WWI's products to persons who either had reasons to give promotional preference to products other than WWI products or who were not persons competent to perform such duties.

While there was sufficient evidence upon which the jury could have determined that Rockland did not fail in any way in connection with any of those matters, there was also sufficient evidence from which Rockland could have been found by the jury to have breached its contractual duties to plaintiffs in each and all of those factual contexts. Accordingly, there was sufficient evidence in the record to enable the jury to reach the answer which its members unanimously gave to question 1A (*see* the Verdict Form set forth in full, *supra*). As previously discussed in this opinion, the district court, while harboring doubts as to liability (*see* the district court's Memorandum filed July 20, 1986, App. 1333), permitted the jury's answer to question 1A to stand. But as to damages, the district court set aside the damages awarded by the jury in its answer to questions 1B(1)a, 1B(1)b, 1B(2)a, 1B(2)b, and entered in its judgment order only $1.00 nominal damages. In so doing, the district court accepted as true the testimony of certain of Rockland's witnesses, rejected as not reliable and/or credible the testimony of at least some of plaintiffs' witnesses, and disregarded the testimony as to damages given by plaintiffs' expert witness, Ms. Linda McLaughlin.

After a lengthy voir dire, which featured full, probing direct examination and cross-examination of Ms. McLaughlin, the district court permitted Ms. McLaughlin to testify as an expert witness, over defendant's challenge. In his post-trial Memorandum, the district judge wrote that he "saw them [i.e., certain witnesses called by Rockland] and believes that they were telling the truth,"[5] and that the "testimony [of plaintiffs' expert witness] contained fundamental inaccuracies and was based upon assumptions not supported by the evidence" and "should have been stricken and the jury instructed that if it re-

---

[5] App. 1343.

turned a verdict in favor of Chumbley, it should be for nominal damages of one dollar only." [6]

Earlier, during trial, before permitting Ms. McLaughlin to testify concerning two of her three alternative damage estimates, the district judge stated that he had "some . . . "factual questions" about the two theories "but they're not for me to resolve, they're for the jury to resolve." [7]

The jury trial in this case took over six weeks to complete. The record is voluminous. Despite the district court's strong perference for the factual positions concerning liability taken by defendant, there was clear evidence to support the jury's special verdicts in favor of plaintiffs concerning liability. Nor did such evidence involve assessment of evidence by the jury which was very difficult for lay persons to understand. The same can hardly be said as to the testimony concerning damages. But there was evidence from which, if believed, a jury could have awarded damages not only of $1,000,000.00 but, under certain of the approaches relied upon by plaintiffs, in excess of $1,000,000.00. That would not be true if Ms. McLaughlin's expert testimony had not been received. But in this case, while the district court might originally have refused to qualify Ms. McLaughlin as an expert without abusing its discretion, *cf. Midcontinent Broadcast Co. v. North Central Air, Inc., supra,* the specter of a second very lengthy trial—*see Abasiekong v. City of Shelby, supra; Mays v. Pioneer Lumber Corp., supra*—a second trial in which the same kind of damage issues would need to be determined by the jury—leads this court to opt for finalization and acceptance of the jury's damage awards at this time without further trial.

Accordingly, the within case is hereby remanded to the district court with instructions to strike both of its al-

---

[6] App. 1339.

[7] App. 627.

ternative orders for judgment notwithstanding verdict and for a new trial and to enter judgments for plaintiffs in accordance with the jury's answers to the special questions. In so doing, this court notes the careful, conscientious efforts of the district judge not only successfully to preside over a fair trial but to grapple with his own strong assessments of the evidence and his concomitant determination to avoid a miscarriage of justice. But the evidence in this record, as in *Abasiekong*, simply does not permit this court to permit negation of the jury's special verdicts.

REVERSED AND REMANDED
WITH DIRECTIONS

WILKINSON, concurring in part and dissenting in part:

I too would reverse the grant of judgment n.o.v. in this case. I would affirm the district court's decision in the alternative to grant a new trial. The discretion of the trial court is broad on the latter motion, and for the reasons amply stated in the district court's opinion, I believe the exercise of its discretion should be affirmed.

In my judgment, the majority has reinstated the jury verdicts all too readily. Such holdings tend to alter the careful balance that exists in The Federal Rules of Civil Procedure and innumerable precedents of this circuit between the function of the trial judge and the jury. In this instance, the reversal has a doubly unfortunate impact, because it tends to make those who agree to promote and market a product the virtual guarantors of its success. The effects of such rulings on our distributional network will not be salutary.

Here the district court was convinced

> that the overwhelming weight of the evidence was against the jury's verdict. Specifically, the Court is convinced that what happened is essentially what Rockland contends happened: (1) Rockland entered into signing the license agreement with Chumbley because of its primary interest in his drapery system; (2) Chumbley never was able to deliver the drapery system; (3) Rockland nevertheless did all that it could to market the Warm Window product, including taking on its payroll at substantial expense persons recommended by Chumbley; (4) to the extent that Rockland arguably may have made mistakes in its marketing efforts, Chumbley failed to prove any causal connection to his alleged damages; (5) among the reasons for the market's non-acceptance of Warm Window were decreasing consumer sensitivity to energy needs, the limited number of persons willing to purchase a do-it-yourself product and the lack of aesthetic quality in the product; and

(6) Chumbley's proof of damages was, even if not legally insufficient for the reasons stated *supra*, fraught with inaccuracies and totally unsupported by the evidence.

I think the district court correctly set aside the verdict below as against the weight of the evidence and I would affirm that portion of its judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-84-3237

JAMES E. CHUMBLEY, *et al.*

v.

ROCKLAND INDUSTRIES

[Filed June 20, 1986]

MEMORANDUM

Pending before the Court are defendant's motions for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Most of the issues raised are ones which have been considered and ruled upon during the course of the trial, and it would not be particularly useful to restate exhaustively here the factual context in which they arise. Rather, this memorandum will simply state briefly the Court's rulings and the reasons for them. The motion for a judgment notwithstanding the verdict will be granted. The motion for a new trial will likewise be granted in the event that on appeal the granting of the motion for a judgment notwithstanding the verdict is reversed.

I.

The standard for granting a judgment notwithstanding the verdict is the same as that for granting a directed verdict. *See Brady Administratrix v. Southern Railway*

Co., 320 U.S. 476, 479-80 (1943). The question on a j.n.o.v. motion is whether there was produced at trial "evidence upon which a jury could reasonably return a verdict . . . ." *Abasiekong v. City of Shelby*, 744 F. 2d 1055, 1059 (4th Cir. 1984). In determining the sufficiency of the evidence the Court "is prohibited from assessing the credibility of witnesses and weighing the evidence," *Whalen v. Roanoke County Board of Supervisors*, 769 F. 2d 221, 224 (4th Cir. 1985), and must review the evidence in the light most favorable to the prevailing party. *See, e.g., Evington v. Forbes*, 742 F. 2d 834, 835 (4th Cir. 1984); *N.J. Scavens v. Macks Stores, Inc.*, 577 F. 2d 870, 873 (4th Cir. 1978).

In short, the question is whether the evidence was legally sufficient to sustain the verdict. In this case Chumbley's evidence failed in two critical respects. First, the "before" and "after" dollar sales figures which his economist, Linda McLaughlin, used to demonstrate that the sales performance for Warm Window allegedly declined after Rockland assumed marketing responsibility for it were not comparable to one another.[1] Second, the assumptions made by McLaughlin in projecting anticipated sales (and Chumbley's consequent losses of royalties and commissions) were not supported by any expert marketing testimony or other evidence.

As the basis for her testimony, McLaughlin compared the dollar sales volume of Warm Window in 1982 with the volume in the three subsequent years and the pro-

[1] Chumbley contends that McLaughlin also used the "yardstick" method in calculating damages. In fact, she did not do so. She looked at outside industry sources not so much to confirm her analysis but to provide a basis for her second approach to damages, the so called "industry growth method," which resulted in higher damage calculations. This method, as well as what Chumbley calls her "before and after method," depended fundamentally upon her before and after figures. McLaughlin's third method, the "former customer method," about which the Court disallowed testimony, likewise depended on these figures.

jected volume in the four years thereafter. The flaw in her testimony was that the price charged per yard in her base year of 1982 was substantially higher than the evidence indicated that it could be in subsequent years. For the first three quarters of 1982 Chumbley was selling Warm Window as a combined distributor and manufacturer, selling primarily to retailers. In the last quarter he purchased Warm Window from Rockland and sold exclusively as a distributor. His average sale price was approximately seven dollars per yard. The evidence was undisputed that the price charged to distributors by the manufacturer is and should be substantially lower than the price charged to retailers so that distributors can mark up the price to obtain a fair return for the efforts which they make in the marketing effort. The evidence was also undisputed that in marketing Warm Window Rockland could not have charged a higher price to its distributors: all witnesses with knowledge testified that Window Quilt, undisputably Warm Window's largest competitor, was cheaper than Warm Window.[2] Against this background, it is clear that in calculating an alleged decline in sales performance, McLaughlin was comparing apples and oranges: figures based upon sales made by Chumbley in 1982 at his distributor's price and Rockland's sales in subsequent years based upon its substantially lower manufacturer's price.

Rockland's evidence demonstrated the incongruity inherent in McLaughlin's figures. Mrs. Leaderman testified to an analysis which she made which unquestionably showed that if dollar sales volumes utilizing manufacturer's prices for 1982 and subsequent years were compared, there would have been no decline in sales per-

---

[2] The evidence indicated that when sold as a do-it-yourself product, Warm Window is cheaper than Window Quilt, which is sold only in custom-made form. However, the evidence was also undisputed that the do-it-yourself market was declining and that in order to compete Warm Window had to be sold as a custom made product.

formance at all.[3] The very premise of McLaughlin's calculations—the 1982 base year figures—was without basis. Her castle of damages was built upon sand.

The second flaw in Chumbley's proof of damages was equally fundamental. McLaughlin was entirely unqualified to be a marketing expert and had to assume the marketing facts underlying her testimony which were critical to the case. As properly characterized by Rockland, McLaughlin was no more than a "number cruncher." Nothing could more dramatically demonstrate the entirely derivative nature of her testimony than the fact that she testified to three different sets of damage calculations, ranging from $1,020,510 to $2,459,674, indicating that all were equally reasonable.

In and of itself McLaughlin's lack of personal knowledge of the underlying marketing facts would not render her testimony incompetent and inadmissable. What is lacking is any evidentiary basis for the assumptions which she made. McLaughlin's calculations assumed enormous growth rates in the marketing of Warm Window after 1982: her so called "flat sales method," the most conservative of her three approaches to damages, assumed a growth rate in dollar sales of 189% from 1982 to the end of 1985.[4] To support her assumption that such a growth rate was feasible, Chumbley points to various particles of evidence, including Mr. Leaderman's alleged statement to him that Rockland would reach 10 million dollars in sales, Stanley Fraden's reference to

---

[3] Mrs. Leaderman's figures themselves were generous to Chumbley since they adjusted the distributor's and manufacturers' prices only the fourth quarter (when Rockland was selling to Warm Window, Inc. as a distributor). This adjustment was clear, unchallenged and undisputed. Adjustment of the prices for the entire year would, of course, have decreased the dollar sales performance even further.

[4] If McLaughlin had used, as she should have used, dollar sales volume based upon a manufacturer's price in 1982, her growth rate would have been 251%.

Rockland's thousands of customers, projections made by Janice Miller in her marketing plan, a statement made in a memorandum written by Rockland's comptroller that Warm Window sales could reach 5 million dollars and Chumbley's own projections in his 1982 private placement memorandum. These items of evidence were totally insufficient to support Ms. McLaughlin's assumptions leading to her grand damage calculations. By their nature all of them were speculative, not the product of genuine market analysis. Furthermore, each of them possessed an individual infirmity.

Mr. Leaderman's statement to Chumbley, if made at all,[5] was made at the very inception of the parties' relationship, when hope was springing eternal and the hard realities of the market place had not yet taken their toll. More importantly, it was made at a time that Mr. Leaderman was expecting to market in addition to Warm Window Chumbley's drapery system which he believed to be the more viable product. Fraden's statement that Rockland has thousands of customers provides no basis whatsoever for McLaughlin's assumption as to the marketability of Warm Window. Janice Miller had no marketing background and was not qualified to give a marketing opinion. Moreover, the evidence demonstrated that Rockland did substantially increase its customer base for Warm Window in accordance with her projections. The statement in the memorandum by Rockland's comptroller was an isolated remark made by a man with no marketing background and about which no evidence was produced at trial. The projections made by Chumbley in his 1982 private placement memorandum constituted perhaps the weakest basis for McLaughlin's testimony of all. Even Chumbley acknowledged in the memorandum the speculative nature of his growth projec-

[5] Mr. Leaderman denies having made the statement. The jury made no specific finding on the issue. However, for purposes of this analysis the court assumes that the jury found that it was made.

tions by stating "there is no assurance of market potential and growth." The projections were made at a time that there was an extremely meager past sales history for Warm Window. Furthermore, the evidence at trial demonstrated that in 1982, except for one month, when he was responsible for marketing none of Chumbley's projections were met.

For these reasons the Court concludes that McLaughlin's testimony contained fundamental inaccuracies and was based upon assumptions not supported by the evidence. Accordingly, her testimony should have been stricken and the jury instructed that if it returned a verdict in favor of Chumbley, it should be for nominal damages of one dollar only. A judgment notwithstanding the verdict to that effect will be entered.

II.

As noted by Judge Sobeloff in *McCracken v. Richmond, F & P. R. R.* 240 F. 2d 484, 488 (4th Cir. 1957), "there is a difference in the function of the judge when he is ruling on a motion for directed verdict and when he passes on a motion for a new trial. In the former instance, it is his duty to accept the plaintiff's version as true for the purpose of the motion, notwithstanding the existence of strong evidence to the contrary; the judge is not concerned with the weight of the evidence. On a motion for a new trial, however, he has a wider, though not unlimited latitude and he may set the verdict aside where it is against the weight of the evidence, for it to prevent injustice." Recently the Fourth Circuit has held that in ruling upon a motion for a new trial, "a trial judge has a duty to set aside a verdict and grant a new trial even though the verdict is supported by substantial evidence, 'if he is of the opinion that the verdict is against the clear weight of the evidence or is based upon evidence which is false or will result in a miscarriage of justice.'" *Gill v. Rollins Protective Services Co.*, 773

F. 2d 592, 594 (4th Cir. 1985) (quoting *Willams v. Nichols*, 266 F. 2d 389, 392 (4th Cir. 1959)); accord, *Wyatt v. Interstate & Ocean Transport Co.*, 623 F. 2d 888 (4th Cir. 1980).

In this case the Court is convinced to a moral certainty that (in the event that the entry of the judgment notwithstanding the verdict is ultimately held to have been erroneous), a gross miscarriage of justice would result if a new trial were not granted. In reaching this conclusion the Court has been mindful that it should not denigrate the jury system by substituting its judgment for the jury's simply because it is in disagreement with the verdict. Further, the Court has given full consideration to the fact that the trial lasted six weeks and that a second trial would severely tax both the private recources of the parties and the public resources of the judicial system. However, after full and deliberate consideration the Court has reached the decision that a new trial must be granted. The verdict is shocking.

The reasons for this conclusion are so numerous that it would be impossible to state them all without reviewing all of the evidence in detail—a task which would be so time consuming so as to interfere with the expeditious resolution of this litigation. Generally, the basis for the Court's conclusion is that assuming (contrary to what the Court has found in granting the j.n.o.v. motion) that Chumbley did present sufficient bits of evidence to withstand a motion for directed verdict, there was no substance to this evidence. A trial is more than a board game. Justice is not served simply by adding pieces together to fill in the configuration of a cause of action. There must be an underlying reality to what occurs in a courtroom.

To some extent the insubstantiality of Chumbley's evidence is apparent from the face of the record. However, the gossamer nature of that evidence can only be fully

appreciated by having observed the witnesses. Chumbley's past failures as a businessman are self-evident. The dubiousness of his claim concerning the virtually unlimited marketability of Warm Window is strongly suggested by the fact that in 1982 he could not raise $100,000 in venture capital for his business. His down playing, if not outright denial, of Rockland's avid initial interest in his drapery system is belied by the very nature of Rockland's business as a drapery lining manufacturer. The after-the-fact character of many of his present criticisms of Rockland's marketing decisions is indicated by the facts that Rockland contemporaneously gave him fully opportunity to offer his views and recommendations, hired at substantial expense many of the personnel whom he deemed to be key to the marketing effort and retained him to direct the marketing of Warm Window as soon as early difficulties were confronted.

There were also grave weaknesses in the testimony of Chumbley's other witnesses. The serious flaws in McLaughlin's testimony are discussed in part I, *supra*. She obviously had no first hand knowledge or expertise in the area of marketing and was merely translating Chumbley's assertions into figures. Karen Ott and Bob Wiles were merely small distributors with a knowledge of only extremely limited market segments. While they (particularly Ott) may have personified the type of eager disciple who gave Chumbley himself his early success when Warm Window was being distributed on a small scale, they totally lacked any experience in, or appreciation for, the difficulties in large scale commercial distribution of a product. Chumbley's other devotees, Jean Grove, Judy Treathaway and Janice Miller, were similar in background. The fact that Rockland took them on board and retained Miller for a long period at a high salary indicates the efforts which it was willing to undertake to try to market Warm Window successfully. The opinions expressed by John Kay, Chumbley's mar-

keting expert, were of little, if any, value. His limited knowledge of the relevant market, as ruled by the Court during the trial, made him unqualified to express any opinions specifically relating to the available market for Warm Window. His own failure in starting up his own business after leaving Hunter-Douglas Company, where he had been employed as an executive, made the quality of his judgment inherently suspect. Some of his opinions—such as that a highly disciplined management structure is better than an informal management style—were simply expressions of a preference as to matters which are self-evidently matters of reasonable disagreement. Furthermore, Chumbley utterly failed to prove any causal link between any specific marketing error pointed to by Kay, e.g., the marketing of Window Fleece or the change in name from Warm Window to Wonderful Window, and the loss of any sales, commissions or royalties.

Rockland's evidence, on the other hand, was forceful. Its two marketing experts had sound credentials, had done their homework and had substantial knowledge of the relevant industry. Francis Dammers, another of its witnesses, is acknowledged to be a grandfather of the window covering industry and his insights directly confirm Rockland's position that the market for the Warm Window product simply has not been in existence for the past several years. He also convincingly testified that Rockland's advertising budget for Warm Window was far greater then is usual for such a product. Moreover, while recognizing that they are parties to the litigation with a direct stake in its outcome, the Court believes that the testimony of the Leadermans, Fraden and other Rockland personnel was persuasive. The Court saw them and believes that they were telling the truth. Moreover, one factor is paramount. Although, as Chumbley has argued throughout this case, motive is not an element of his cause of action, there was absolutely no reason for

Rockland not to exercise reasonable efforts to market Warm Window. It was in its, as well as Chumbley's, financial interest to do so. It may have made occasional mistakes in its efforts but the record is uncontradicted that it expended substantial monies and efforts in attempting to market the product.

In short, the Court is convinced that the overwhelming weight of the evidence was against the jury's verdict. Specifically, the Court is convinced that what happened is essentially what Rockland contends happened: (1) Rockland entered into signing the license agreement with Chumbley because of its primary interest in his drapery system; (2) Chumbley never was able to deliver the drapery system; (3) Rockland nevertheless did all that it could to market the Warm Window product, including taking on its payroll at substantial expense persons recommended by Chumbley; (4) to the extent that Rockland arguably may have made mistakes in its marketing efforts, Chumbley failed to prove any causal connection to his alleged damages; (5) among the reasons for the market's non-acceptance of Warm Window were decreasing consumer sensitivity to energy needs, the limited number of persons willing to purchase a do-it-yourself product and the lack of aesthetic quality in the product; and (6) Chumbley's proof of damages was, even if not legally insufficient for the reasons stated *supra*, fraught with inaccuracies and totally unsupported by the evidence.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: June 20, 1986

/s/ J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3584

JAMES E. CHUMBLEY; THOMAS LENCHEK;
MICHAEL CORKE; JO YOUNT; ADRIAN DE BEE,
Plaintiffs-Appellants

v.

ROCKLAND INDUSTRIES, INC.,
Defendant-Appellee

v.

WARM WINDOW, INC.,
Plaintiff-Appellant

[Filed Sept. 17, 1987]

Appeal from the United States District Court
for the District of Maryland

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the Uinted States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion filed herewith.

/s/ John M. Greacen
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-84-3237

JAMES E. CHUMBLEY, *et al.*

v.

ROCKLAND INDUSTRIES

[Filed June 20, 1986]

ORDER

For the reasons stated in the memorandum entered herein, it is this 20th day of June 1986

ORDERED

1. The defendant's motion for judgment notwithstanding the verdict is granted;

2. The order of judgment previously entered herein is amended to enter judgment on behalf of plaintiffs against defendant on plaintiffs' claims in the amount of $1; and

3. In the event that this Court's granting of the motion for judgment notwithstanding the verdict is reversed on appeal, defendant's motion for a new trial is granted.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3584
86-3618

JAMES E. CHUMBLEY, *et al.*,
Appellants

v.

ROCKLAND INDUSTRIES,
Appellee

[Filed Dec. 3, 1987]

Appeals from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, District Judge

Upon consideration of appellee's motion for stay of mandate pending application to the United States Supreme Court for writ of certiorari, a letter from appellee's counsel submitted pursuant to Rule 37 of the Federal Rules of Appellate Procedure, and the responses thereto;

IT IS ORDERED that the Clerk is hereby directed to include in the mandate a statement that post-judgment interest is granted to appellants from the date of judgment, February 24, 1986, at the rate of 7.71 percent.

IT IS FURTHER ORDERED that the motion for stay of mandate is denied.

Entered at the direction of Judge Kaufman, United States District Judge sitting by designation, with the concurrence of Chief Judge Winter and Judge Wilkinson.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3584
No. 86-3618

JAMES E. CHUMBLEY, *et al.*,
Appellants,

versus

ROCKLAND INDUSTRIES, INC.,
Appellee,

versus

WARM WINDOW, INC.,
Third Party Defendant.

[Filed Oct. 23, 1987]

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Kaufman, United States District Judge sitting by designation. Judge Wilkinson dissents.

For the Court,

/s/ John M. Greacen
Clerk